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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ANTHONY GIACOMINO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

Does the Due Process Clause of the Fifth Amendment require reversal of a conviction when improper conduct of the prosecutor at the investigative stage denied Petitioner the benefit of the exculpatory testimony of an expert witness?

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Petitioner, by his attorney, petitions for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming his conviction in the United States District Court for the Northern District of Illinois in the instant case.

OPINIONS BELOW

The case was decided by the Court of Appeals for the Seventh Circuit by unpublished memorandum order, *United States* v. *Giacomino,* Seventh Circuit No. 81-2212, October 27, 1982. The order is reproduced in the Appendix. No opinion was filed in the District Court.

JURISDICTION

Judgment of the Court of Appeals for the Seventh Circuit was entered on October 27, 1982. A timely Petition for Rehearing was denied on November 17, 1982. The order of denial is reproduced in the Appendix. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States. "... Nor shall any person be ... deprived of life, liberty, or property, without Due Process of law. ..."

STATEMENT

Petitioner, Anthony Giacomino, was the owner and operator of three corporations whose offices were located in two mobile trailers in Bensenville, Illinois. On January 28, 1980, the two trailers and their contents were consumed by fire. Corporate records of the three corporations, including particularly their payroll records, were destroyed in the blaze.

Prior to the fire, the Grand Jury of the District Court had been investigating fraud in connection with the billings to the City of Chicago of various companies connected with snow removal efforts resulting from Chicago's Blizzard of 1979. Petitioner's companies were among those under investigation, since they had done a great deal of snow removal business with the City. The Government took the position that Petitioner had procured some person or persons unknown to set fire to his trailers for the primary purpose of destroying the corporate records then subject to Grand Jury subpoena. Count One of the Indictment charged obstruction of justice in violation of 18 U. S. C., § 1503. Count Two charged mail fraud in violation of 18

U. S. C., § 1341, and specifically cited Petitioner's mailing of a proof of loss statement to his insurance company in order to obtain payment on his policy after the fire. Count Three, drawn under 18 U. S. C. § 844(i), charged the unlawful use of explosives (gasoline) allegedly used to start the fire. R. 1.

Trial commenced in the District Court sitting with a jury on May 11, 1981. Upon verdicts of guilty Petitioner was sentenced to a total of seven years in prison and fined $16,000.00. His direct appeal to the Court of Appeals for the Seventh Circuit resulted in the memorandum order contained in the Appendix affirming his conviction.

During the period after the fire was extinguished, Petitioner advised his insurance company of the loss. The insurance adjustor, Thomas McKeever, contacted the Metropolitan Chicago Loss Bureau to conduct an investigation of the cause and origin of the fire and the extent of the damage. T. 1108. That Bureau services insurance companies and adjusting firms in the Chicago area and is supported, in turn, by fees paid by insurance companies. The fire investigator assigned to this particular incident was Carl E. Scheel, a veteran investigator with long and broad experience in arson and related situations. Scheel visited the premises nine days after the fire and came to the conclusion he repeated in his report, that the blaze was of electrical origin and accidentally caused.

Trial counsel for Defendant filed a Motion to Dismiss based upon prosecutive misconduct in connection with the dealings between representatives of the Government and Carl Scheel. On the allegations of the Motion, the District Judge conducted a hearing at which both Scheel and McKeever testified. It appears that on March 19, 1980, Scheel was contacted by the Assistant United States Attorney in charge of the Grand Jury investigation. Scheel appeared at the United States Attorney's office as he had many times in cases in which he had appeared as an expert witness on behalf of the Government. He did not appear before the Grand Jury on that

day, but instead, he was questioned in the United States Attorney's office. When he repeated the conclusions he had reached in his report, the Assistant United States Attorney "lowered the boom on me." T. (Sp. Vol.) 25. Scheel was directly accused of having accepted a bribe from Petitioner in return for finding the cause of the fire to have been accidental. At that point in the discussion Scheel called his office and, following instructions, terminated the interview until such time as he could be represented by Metropolitan Chicago Loss Bureau counsel. No evidence of any sort was ever offered or admitted tending to establish any bribe, payment or consideration whatever to Scheel from Giacomino or anyone else.

During the course of this and subsequent discussions with representatives of the Government, Scheel was continually told that the Government possessed overwhelming evidence that the fire had been deliberately set and was not of accidental origin. Never, however, did the Government share that evidence with him. No explanation of the basis of the conclusion the Government's representatives had apparently reached was offered to Scheel so that he could re-evaluate his own conclusions in the light of those disclosures. He was simply repeatedly threatened and browbeaten in an attempt to force his conclusions into the Prosecutor's preconceived mold. On April 17, 1980, he again appeared at the United States Attorney's office, along with two Loss Bureau attorneys in response to a Grand Jury subpoena. Once again, he was interrogated in the Prosecutor's office. According to Scheel, he felt "like a target." T. (Sp. Vol.) 45. The Prosecutor read him his *Miranda* rights. T. (Sp. Vol.) 46. Eventually, Scheel was called and did appear before the Grand Jury on July 23, 1980. T. (Sp. Vol.) 63. His conclusion, which had initially been so positive and forceful, had been reduced to a melange of doubts and possibilities and his testimony, once of inestimable value to Petitioner was by this time veritably worthless. McKeever's testimony at the Pretrial hearing, T. 104 et seq., tended to corroborate Scheel's

concerning his various appearances in the United States Attorney's office and his telephone call in the course of his initial appearance there. At the conclusion of the hearing, Judge Leighton indicated his thinking about the course of conduct pursued by the representatives of the Government in this case:

> "Mr. Jones [the Prosecutor]: All right, your Honor, is the Government's position here that Mr. Scheel, the Court seems to take the position that Mr. Scheel was treated unfair.
>
> The Court: Yes, now that you say it, I will agree with you." T. 124.

And later:

> "The Court: .... [I]t seems to me that the United States Attorneys have to be told by somebody that you can't engage in this kind of conduct.
>
> Mr. Jones: Your Honor.
>
> The Court: That's all there is to it.
>
> Mr. Jones: Well—
>
> The Court: It strikes me as fundamentally unfair behavior and this man has testified to what occurred.
>
> Mr. Jones: Sure did.
>
> The Court: For him to be told by a United States Attorney he was going to be proved he was a bribe-take.
>
> Mr. Jones: Your Honor, let me—wait. I certainly—
>
> The Court: That conduct shouldn't be engaged in and somebody has to tell the United States Attorneys they shouldn't do that." T. 124-125.

The Trial Judge, in an attempt to fashion a remedy that would undo the injustice wrought by this "fundamentally unfair behavior," ruled that if the Defendant were to call Carl Scheel as a witness for the defense, the Government would not be permitted to impeach through the use of his Grand Jury testimony.

At trial, Scheel was subpoenaed as a witness for the defense. T. 1545. After qualifying questions establishing his expertise in the causes and origins of fires, he testified concerning the particulars of his examination of the fire scene on February 9, 1980. He stated the conclusion of his report that the fire was accidental and caused by an electrical overload, T. 1563; and he described a ruptured conduit and the beading or welding together of wires in the conduit which he discovered at the scene, T. 1567. The Prosecutor cross-examined concerning the certainty with which Scheel held to his initial opinion and the defense objected. In the course of the colloquy which followed, the following occurred:

> "Mr. Martin [Petitioner's Trial Counsel]: Your Honor, the reason Mr. Stewart, Assistant United States Attorney, is confident of the question is because he knows what the witness has to answer because the witness has answered in the Grand Jury under oath, he did not have an opinion.
>
> The Court: What page? I think I remember that. I was looking for it.
>
> Mr. Martin: It begins on page 13, Your Honor, and it also—
>
> The Court: Well, what I was going to tell Mr. Stewart, Mr. Stewart, you know, there is a rule of fundamental fairness in these matters. It is true that you won't use the Grand Jury transcripts to cross-examine him, but is quite possible for the lawyer to memorize this transcript and ask him the same questions. What I wanted to say to you is that all of us as members of the bar of this great profession of which we are members, we have to be fair about these matters, and what I was going to say was just avoid utilizing the substance of this transcript without actually using it. You see, because then you accomplish the same results. I am going to have to trust entirely on your sense of fairness.
>
> • • •

So, just don't do that because then you will be able to accomplish the very thing which I have ruled isn't fair for the Government to do.

* * *

After all, the Grand Jury transcript isn't extensive. Anybody could memorize that transcript and ask him the same questions he was asked before that Grand Jury. But I have to rely entirely on you gentlemen for the prosecution.

* * *

I am not going to say anything more about it." T. 1616-1619.

The other evidence at the trial, largely concerned with the motive of Petitioner and his reaction to the fire, is detailed in the Seventh Circuit's Order.

REASONS FOR GRANTING THE WRIT

The instant case presents an opportunity to delineate the limitations placed upon a prosecutor's pretrial investigative conduct by the Due Process clause of the Fifth Amendment to the Constitution of the United States. That conduct in this case resulted in the loss beyond redemption of the most significant evidence with which Petitioner could have defended the charges against him. The favorable, indeed exculpatory, expert opinion of the independent insurance investigator was forever lost to the defense. We suggest that scrupulous adherence to constitutional requirements having to do with elemental fairness and an equally scrupulous concern for the rights of a defendant in the course of the trial may be simply valueless in the absence of judicially enforced controls governing the pretrial conduct of prosecutive personnel. While much judicial attention is directed to the question of how best to enforce standards of lawfulness and decency in the obtaining of evidence for prosecutive purposes, it is of at least corresponding importance that similar standards govern a prosecutor's efforts to overcome potentially countervailing evidence.

Scheel is a fire investigator and expert witness of long and distinguished standing. His reputation as a forensic scientist was beyond cavil. His normal and accustomed position in criminal litigation was that of a witness on behalf of the Government or of the State to prove the deliberate setting of fires in arson cases; he had testified many times in that capacity. In the instant case his examination of the scene, including his discovery of the fused electrical wiring, led him to the conclusion that the fire was accidental and electrical in origin. He made his report accordingly and advised his fire insurance carrier to settle Giacomino's claim under his policy on that basis. The Government's experts did not agree. They claimed that the conflagration was deliberately ignited and based that belief upon the presence of some sort of petroleum based accelerant. At that juncture issue was joined involving the kind of conflict juries resolve every day in our courtrooms. And had such an unfettered jury resolution of that conflict occurred in this case Petitioner should have no complaint here. That kind of resolution simply did not occur and that it did not was directly traceable to the improper exercise of the coercive power of the prosecutor.

Not content with putting the issue squarely to a jury, based on a full presentation of the evidence on both sides, and abiding the result, the prosecutor determined to iron this peculiarly troublesome kink out of his case long before a jury was even selected. Accordingly, every possible step was taken to force Scheel's anticipated evidence into conformity with the Government's theory. In our statement, we have catalogued the coercion, the threats, the abuses of the grand jury process, and the like which were brought to bear upon Scheel in a raw, if sophisticated, display of naked prosecutorial power. The tactic worked. Scheel's grand jury testimony hardly resembles his report and his trial testimony was of negligible value to Defendant. In fact, during the entire pretrial period the instant case was pending Scheel refused to discuss his findings with

counsel for the Defendant. The indicia of fear are unmistakable. Paraphrasing Scheel's testimony, the boom had been lowered upon him and his reaction, while less than courageous, was eminently human.

We contend that such conduct on the part of a representative of the Government resulted in the denial of due process to Petitioner. Basically, the situation resolves to one in which the Government, while prosecuting with one hand, seeks to compromise a true and honest defense with the other, the precise situation which the constitutional guarantees of both Fifth and Sixth Amendments were intended to prevent. However the concept of due process be formulated, its essense is fundamental fairness.

Since *Mooney* v. *Holohan,* 294 U. S. 103, and *Brady* v. *Maryland,* 373 U. S. 83, prosecutive suppression of evidence favorable to a defendant whether upon the issue of guilt as here or of punishment has been condemned. This case involves more than prosecutive suppression of exculpatory evidence; it involves prosecutive destruction of exculpatory evidence. We submit that the Fifth Amendment prevents conviction in such circumstances.[1]

We do not question the Government's right, even duty, to maintain prosecutions with vigor but that right presumes that an equally vigorous attempt to maintain the contrary position is

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[1] The Due Process clause was applied to require a summary *per curiam* reversal by the Fifth Circuit in *United States* v. *Henricksen,* 564 F. 2d 197 (5th Cir., 1977). In that case a co-defendant whose testimony would have been of value to defendant entered into negotiations with the prosecution looking toward a plea bargain. The bargain was struck, but one of its conditions explicitly provided that the co-defendant would not testify at the trial on behalf of Defendant. In compliance with the plea agreement, the co-defendant refused to testify.

> "Substantial Government interference with a defense witness' free and unhampered choice to testify violates due process." 564 F. 2d 197, 198.

permissible. It is only through advocacy on both sides that criminal trials may satisfactorily fulfill their great historical and constitutional purpose. When the power of the Government is used not only to assert its own contentions in a criminal prosecution but to prevent the marshalling of contradictory evidence, the adversary system is, to that extent, perverted. See *Washington* v. *Texas,* 388 U. S. 14, and *United States* v. *Andolschek,* 142 F. 2d 503 (2nd Cir., 1942).

The analysis of this Court in *United States* v. *Valenzuela-Bernal,* ____ U. S. ____, 73 L. ed. 2d 1193 (O. T. 1981, No. 81-450, decided July 2, 1982), is pertinent. In that case, a prosecution for the knowing transportation of illegal aliens, the Government deported the aliens involved prior to trial. The opinion of Justice Rehnquist pointed out that the executive's constitutional duty to enforce the deportation laws is entitled to considerable weight along with its responsibilities for prosecution of crime. In *Valenzuela,* noting the absence of any showing that the testimony of the deportees would have been favorable to defendant, the opinion concluded that no reason existed to require the Government to forego the enforcement of one constitutionally viable policy or the other. The requirement that there be some practical indication of the value of such evidence to the defense before its unavailability as a result of governmental action will vitiate a conviction represents an accommodation designed to hamper the Government's legitimate activities as little as possible while minimizing interference with a defendant's ability to honestly contest the charges against him.

Here no legitimate governmental function was served by "lowering the boom" upon Scheel. No policy of Congress was involved and no accommodation of conflicting values is necessary. All trial attorneys doubtless wish that the potential testimony of witnesses for the other side could be neutralized before a jury is selected. We suggest that a prosecutor should not be permitted that luxury through the use of the power of Government to intimidate.

The Trial Judge recognized the impropriety of this prosecutor's activity and he attempted to fashion a means by which the damage could be undone and the parties placed in their original relative positions. It did not work. Scheel's evidence was of virtually no value to Defendant—not because of the cross-examination or of the conflicting evidence or of anything else that occurred in the courtroom, but because instead of what occurred at the investigative stage. It is unfortunately true that decision in a case like the present will serve either to encourage or discourage future conduct of the same sort. We respectfully suggest the constitutional preference should be for a determination calculated to discourage recurrence of the kind of thing that happened here. For that reason we respectfully petition this Court to issue its Writ of Certiorari.

CONCLUSION

For the reasons discussed above, we respectfully submit that this Court ought to issue its Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit to review that Court's judgment in the instant case.

Respectfully submitted

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